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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PULLMAN STANDARD, INCORPORATED
Petitioner,
v.
LOUIS PINKARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below, disregard the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., exceed its appellate authority and, in the words of the dissenting Judge, engage in "precisely the historical practice of the former Fifth Circuit condemned by the Supreme Court in *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) (App. 59a-60a)"?

2. Did the Court below apply a reverse discrimination standard, by weighing respondent's militance as a mitigating factor against his misconduct in deciding whether petitioner's motivation for firing him was lawful, so as to place him in a better position as a result of his militance than he would have occupied as a non-militant committing the same misconduct?

3. Did the Court below err in concluding that an action for retaliation can be brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981?

PARTIES[1]

Information under Rule 28.1: Pullman Standard, Inc., petitioner herein, is presently a separate corporation and a subsidiary of Pullman Transportation Company Inc. Formerly it was a division of Pullman, Inc., known as Pullman-Standard as was so designated in the proceedings below.

[1] The parties in the Court below were: Louis Pinkard, Edward Lofton, Richard Holston, Donnie Sealie, plaintiffs-appellants; and Pullman-Standard, a division of Pullman, Incorporated, defendant-appellee and petitioner here. As a result of several corporate changes it is now a separate corporation known as Pullman Standard, Incorporated.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 10, 1982. Petitioner timely filed and served an application for rehearing and suggestion of rehearing en banc in said Court, and the same was denied without opinion by order entered August 31, 1982.

OPINIONS BELOW

The opinions below are reported as follows: (1) Opinion of the United States District Court for the Northern District of Alabama on October 31, 1978, reported at 80 F.R.D. 287, and 18 FEP Cases 723, (App. 1a); (2) Opinion of said District Court on June 29, 1979, (App. 5a); and (3) Opinion of the United States Court of Appeals for the Fifth Circuit Unit B, now the Eleventh Circuit dated June 10, 1982, reported at 678 F.2d 1211, 29 FEP Cases 216, and 29 EPD ¶ 32,862 (App. 53a).

Copies of these opinions are appended to this petition at the indicated page numbers.

JURISDICTION

The judgment sought to be reviewed was dated and entered on June 10, 1982. Petitioner timely applied for rehearing of said judgment and its application was denied by order dated and entered August 31, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The only statute involved in the questions presented for review is the Civil Rights Act of 1866, 42 U.S.C. § 1981, which is set forth in its entirety in Appendix D, infra, App. 91a. Rule 52(a), Federal Rules of Civil Procedure, is however, of paramount importance herein.

STATEMENT OF THE CASE

This is the case in which the Eleventh Circuit, the ink hardly dried on *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), returned to its historical practice of finding the facts de novo, condemned in *Swint*, and required not equal, but preferential, treatment of activists. A detailed factual statement is perhaps unneccessary since the findings of both triers of fact (arbitrator and District Court) are in the appendix at 37a-50a and 5a-36a respectively. Either one is adequate and reference to either would be approximately equivalent to reading the remainder of this Statement of the Case, with the added observation that the Eleventh Circuit simply found the facts of Mr. Pinkard's case *de novo* without having heard the evidence.

Respondent Mr. Pinkard was discharged on February 12, 1976 and filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) the next day, along with a charge by Mr. Edward Lofton, who had been discharged December 23, 1975 (App. 7a, 12a). Without waiting

for 180 days, conciliation, or a notice of right to sue Pinkard and Lofton commenced this suit on February 17, 1976 claiming jurisdiction under Title VII, 42 USC § 2000e, et seq. (App. 6a). Subsequently Richard Holston and Donnie Sealie were added as plaintiffs and claims by Pinkard and Lofton under § 1981 were added by amendment (App. 6a). On July 26, 1976 three grievances, all over Pinkard's discharge, were submitted to arbitration under the Steelworkers Union contract, and on October 15, 1976, Arbitrator James P. Whyte rendered his award denying the grievances and sustaining the discharge as being for just cause. (App. 16a, 37a) On October 12, 1978 the trial court conducted a Rule 23 hearing following which it found the claims of the plaintiffs were not typical of those of any class, and on October 31, 1978 ordered that the action not be maintained as a class action (80 FRD 287, 18 FEP Cases 723, App. 1a). The merits of the individual claims of the four plaintiffs, all discharged employees, came on to be heard on December 4, 1978, the bench trial lasting four days. On June 29, 1979 the trial court made findings of fact and conclusions of law and entered judgment for Pullman-Standard on all claims. (App. 5a).[2]

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[2] As to Pinkard's and Lofton's Title VII claims the District Court concluded it lacked subject matter jurisdiction because it was not alleged that the EEOC had issued either a notice of failure of conciliation (or so-called right to sue letter) and although such notices were eventually issued on August 18, 1978, 30 months after this action was commenced, they were issued contrary to EEOC published rules, 29 CFR §§ 1601.19 and 1601.28, and were therefore invalid under the Administrative Procedure Act, 5 U.S.C. §§ 552(a)(1) and 555(c). It denied these claims for lack of pleading or proof of valid right to sue letters. (App. 6a-8a).

As to all other claims of Lofton, and the claims of Holston and Sealie, the trial court found that they failed to establish a prima facie case of discrimination; that defendant articulated legitimate reasons for firing each of them (respectively: distributing a handbill advocating a slowdown in breach of the union contract (App. 13a-15a); failure

As to the § 1981 claims of Pinkard, the District Court found after the four-day trial that he also failed to establish a prima facie case of discrimination (App. 19a-20a) in that no disparity in treatment was established (App. 19a). Petitioner articulated as its reasons for firing Pinkard "acts of insubordination to Track Foreman Dave Mason" and abuse of the grievance procedure after warnings (App. 16a). The District Court found as a fact that Pinkard "was insubordinate, that his insubordination was egregious, and that management thereby had a legitimate reason to terminate him" (App. 19a); that "no prima facie showing of discrimination could be found, because no disparity in treatment was established." (App. 19a) More particularly, it found that the insubordination it referred to consisted of two elements: One, he called his foreman, Dave Mason, who was black, a liar, without justification, in the presence of another employee (App. 17a-18a); and two, he loudly refused to go to a meeting with management which Mason told him to attend (App. 17a-18a). The District Court also found he abused the union contract grievance procedure by persistently going outside its channels, which the petitioner tolerated up to a point, but had often warned him to cease; and that the incident leading up to his calling Mason a liar and refusing to meet with management was a typical example of Pinkard's disruptive behavior of resorting to extra-contractual means of handling employee grievances (App. 19a). The District Court's opinion herein further found (App. 20a-21a) that Pinkard's conduct as a union officer subsequent to his discharge, of unlawfully interfering with rights of Pullman-Standard employees to freedom of speech under the LMRDA, 29 USCA § 411(a)(2), dis-

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to follow direct orders of the foreman and his overall record (App. 8a-10a); and refusal to perform as instructed and his overall record (App. 10a-11a)); and there was no proof of pretext.

qualified him in any event from reinstatement and back pay and constituted unclean hands.[3]

The plaintiffs duly appealed the judgment of the District Court to the United States Court of Appeals below, which on June 10, 1982 rendered a fragmented decision affirming it in part, and reversing it in part, but with respect only to the § 1981 claim of Pinkard based on retaliation. The panel majority consisting of Judges Kravitch and Clark made an independent determination of the facts, rejected the District Court's findings that no prima facie case of discrimination had been shown; that no disparity in treatment had been shown; and that management had a legitimate reason to terminate Pinkard; it substituted its own contrary and independent findings;[4] and reversed the judgment "and remand[ed] the case for a determination of damages [sic]." (App. 87a).

The dissenting Judge, Lynne, said (App. 87a-89a):

> "While the court correctly states the controlling clearly erroneous standard of Rule 52(a), F.R.C.P., its conclusion that Pinkard's discharge was motivated in part by his lawful advocacy of minority rights is the product of the court's improper independent consideration of the totality of the circumstances found in the record. That is precisely the historical practice of the former Fifth Circuit condemned by the Supreme Court in *Pullman-Standard* v.

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[3] The other District Court case to which Judge Guin referred was later affirmed on appeal. *Parker* v. *Local No. 1466, United Steelworkers of America, Leonard Lewis, Louis Pinkard and Arvil L. Hulsey*, 642 F.2d 104 (5th Cir., 1981), rehearing denied 646 F.2d 567 (5th Cir., 1981).

[4] The arbitrator who denied Pinkard's discharge grievance and the District Court both held discharge was an appropriate disciplinary penalty. They heard oral evidence. Being joined in their views by Judge Lynne, three out of five who have considered the question have been of the opinion that discharge was not an excessive penalty for the misconduct. Only two have thought it was.

Swint, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

"Acknowledging tangentially that independent review of the record reveals that Pinkard was insubordinate, the Court demurs to the severity of the sanction of discharge as though insubordination may easily be quantified. It therefore proceeds to resolve conflicts in the record evidence, to draw its own inference and to make credibility choices . . . .

"In concluding that the District Court's finding that the company discharged Pinkard because of his insubordination was clearly erroneous in that it was 'against the clear weight of the evidence' . . . the court oversteps the bounds of appellate authority.

* * *

"To put the matter bluntly, the Court has substituted its own finding of ultimate fact for that of the District Court by rehearsing subsidiary facts to suit its purpose without a critical examination of the abundant record evidence which undercuts its conclusion."

The opinion of the Court of Appeals is actually split three ways. It began on a note of unanimity (App. 54a):

"Most of the issues presented provoke no dissent among us. We are in agreement that the district court properly denied class certification. In addition, we agree that the judgment is to be affirmed as to plaintiffs Holston and Sealie. We also agree that the judgment is to be affirmed as to the § 1981 claims of racially-based discharge made by plaintiffs Pinkard and Lofton.

". . . Furthermore, all agree that the judgment is to be affirmed as to Lofton's claim of retaliatory discharge."

Thus, it was unanimously agreed that Holston and Sealie could properly be discharged for insubordination, and that Pinkard's discharge for insubordination was not *racial* discrimination. (However, as we shall see, what was deemed enough to discharge Pinkard as a black was deemed not enough to fire him as a militant).

At this point, the three judges went three divergent ways. The remaining claims were: Lofton's claim for racial discrimination under Title VII, Pinkard's claim for racial discrimination under Title VII, Pinkard's claim for retaliation under Title VII, and Pinkard's claim for retaliation under § 1981. The judges voted as follows:

	Jurisdiction	Merits	Result
Lofton's T.VII race claim	Kravitch & Lynne, JJ. held present: Clark, J., dissented, would find no jurisdiction (App. 66a-73a)	All Concurred, Lofton failed to prove prima facie case of discrimination	Affirmed
Pinkard's T.VII race claim	Ditto	Kravitch & Lynne, JJ. found against Pinkard (App. 55a)	Affirmed
Pinkard's T.VII Claim of retaliation for lawful advocacy	Ditto	Kravitch would find for Pinkard (App. 45a) Lynne against him (App. 87a-89a)	Affirmed
Pinkard's § 1981 claim of retaliation for lawful advocacy	All concurred that jurisdiction was present	Kravitch & Clark, JJ. found for Pinkard; Lynne, J., dissented. (App. 54a)	Reversed and remanded for a determination of damages (App. 87a)

The only questions presented on this petition relate to the Court of Appeals' reversal as to Pinkard's § 1981 claim of retaliation for lawful advocacy. However, we have discussed the disposition of the other eleven claims because there is at least an apparent inconsistency in reversing as to Pinkard's § 1981 retaliation claim while finding that the same insubordination justified his discharge so far as his § 1981 racial claim was concerned; and that insubordination likewise justified the discharges of Holston and Sealie. This inconsistency we submit, is an important clue to the majority's way of erroneously according preferential treatment to militants over non-militants in its fact-finding process.

In order to justify its assumption of the role of independent fact finder as to Pinkard's § 1981 retaliation claim, the majority had to contend with the *Swint* case, supra. Over Judge Lynne's vigorous dissent, the majority asserted that *Swint* was distinguishable, as follows (App. 87a):

> "Nothing in the recent opinion of *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), affects this case. There the Court found that our court had erred in (1) resolving in the first instance a factual dispute which had not been considered by the district court and (2) failing to remand where findings are infirm because of an erroneous view of the law and the record permits two or more resolutions of the factual issue."

Having cleared *Swint* out of the way, the majority said the District Court's finding that no disparity of treatment of Pinkard had been shown, was clearly erroneous, and it proceeded to find the facts as follows:

> "As mentioned, other similar incidents have been met by the employer with reprimands, and never with discharge." (App. 85a)

But the only possible "mention" referred to here was the following portion of the Court of Appeals' majority opinion:

> "In evaluating management's response to the events of February 4, we note that no Pullman employee previously

> had been discharged for calling his foreman 'a liar.' Although the facts surrounding other name-calling incidents were less extreme than those involved in the instant case, we nevertheless acknowledge [sic] that A. L. Hulsey, a white union official, testified that he had heard other employees tell foremen that they were lying 'many times.' Hulsey also testified that he had said to his foreman, 'Well, Hog Jaw, you are lying there. So and so just told me different.' (Record, vol. 2, at 86.)" (App. 82a, footnote 14).

The District Court's finding was explicit that Pinkard was not fired simply for calling Dave Mason a liar, but for other cumulative reasons:

> "Further justification lies in Pinkard's loud refusal to go to the meeting Mason sought him to attend. This showed his disdain for management as well as the orderly resolution of disputes." (App. 18a-19a)

Also,

> "Pinkard was also discharged for abuse of the grievance procedure. Plaintiff's actions in the King incident were typically extra-contractual . . . .
>
> "The court finds that abuse and admonition characterize [Pinkard's] disregard for established methods in handling grievances . . . . [H]is insufferable attitude during the King incident was simply the final item. He gave the defendant ample justification for his discharge." (App. 19a, 20a)

There was *no* evidence that any other employee disobeyed a direct order as Pinkard did who was *not* fired.[5] The Court of

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[5] Indeed, the discharge of plaintiffs Sealie and Holton for insubordination were sustained in this very same opinion, as Swint's discharge for insubordination had been sustained in *Swint* v. *Pullman-Standard*, 539 F.2d 77, 105 (5th Cir., 1976). There was also uncontradicted evidence of many white employees who were discharged for insubordination, as well as Arvil L. Hulsey's testimony that discharge was the usual penalty for insubordination. "The evi-

Appeals majority simply ignored the District Court's findings of what the cause of Pinkard's discharge actually was, and pretended it was only his calling Dave Mason a liar in saying there were other similar incidents not resulting in discharge, for the only incidents they refer to anywhere were the liar-calling incidents which even they say were "less extreme" (App. 82a, n.14), and of which the District Court had found with ample evidentiary support:

> ". . . no instance of comparable significance was presented . . . . [T]his was no joking matter, as the other occurrences clearly were. It was a venomous retort by a man whose resentment still showed through at trial . . . ." (App. 18a)

It was only through this process of saying that which was not so on the record that the Court of Appeals majority declared the District Court's finding clearly erroneous that no disparity in treatment had been shown. But its reasoning process of independent fact finding whereby it found Pullman-Standard's decision to fire Pinkard was motivated by retaliatory animus, is an even more remarkable piece of casuistry.

First, the majority itself finds Pinkard was guilty of misconduct:

> "This court does not condone Pinkard's action in calling Mason a liar or question management's right to punish such behavior." (App. 86a)

However the Fifth Circuit majority (contrary to the arbitrator who denied Pinkard's discharge grievance and to the District Court, both of whom found against Pinkard on the facts) made the new finding that discharge was *too severe* a penalty for

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dence was conclusive that most cases of insubordination resulted in termination, whether the employee was white or black." (App. 11a). Likewise, there was no evidence of any other employee who persisted in extra-contractual grievance procedures after warnings and orders not to, who was not fired.

Pinkard's misconduct, because in assessing the penalty Pinkard's misconduct must be balanced against his activism or lawful advocacy:

> "The [District] court's reference to an independent judicial proceeding, combined with its description of the Mason incident as a 'venomous retort by a man whose resentment still showed through at trial, leads this court to the conclusion that the trial court improperly focused on plaintiff's antagonism *without counterbalancing the defendant's own antagonism.*
>
> ". . . The question we are faced with . . . is whether Pinkard's discharge was *the proper punishment* or whether . . . his discharge was an overly severe penalty tainted to an impermissible degree by Pinkard's lawful advocacy of *minority and union rights.* The evidence clearly shows it was the latter." (Emphasis added.) (App. 85a-86a)

Thus the Court of Appeals majority, granting the propriety of some punishment for some misconduct,[6] says that in determining the degree of discipline the employer is obliged to balance against the employee's misconduct and antagonistic attitude it exemplifies, the employee's activism in advocating minority and union [sic] rights and the antagonism it presumes this generates in the employer. In other words, the employer cannot fire the militant activist (Pinkard) for the same misconduct for which discharge of a non-activist (Holston, Sealie) would be a condign penalty. Plaintiff Lofton had also been a steward, had filed numerous grievances and an EEOC charge. Yet no balancing process was even mentioned by either court below in reference to Lofton's claims. Why Pinkard is entitled to balancing and Lofton is not is without any apparent explanation. Finally, the penalty of discharge was held by the majority

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[6] The only misconduct it conceded merited some punishment was his calling Mason a liar. It does not say whether his disobedience of the order to go to a meeting merited any.

not too severe for Pinkard qua Negro;[7] it was too severe for him only qua militant.

The majority palliates its role of ultimate fact finder by some incredible pretensions:

> "We have reviewed all of the testimony carefully. The evidence, *largely uncontradicted*, clearly demonstrates that the discharge of Pinkard would never have occurred but for his union and racial activism . . . . (App. 85a)
>
> ". . . *Credibility of witnesses is not an issue* because there is no significant conflict in the evidence." [Emphasis added.] (App. 86a-87a).

Pullman's Industrial Relations Manager J. R. Hudson testified in regard to Pinkard's discharge:

> "I think the reason for his discharge is very well stated in a letter of February 12, 1976 that was given to Mr. Pinkard and signed by Mr. Johnson, Mr. Moss and Mr. Dave Mason. This is the basis for his discharge . . . ."

The letter read:

> "After careful consideration of your conduct of last week, the Company has concluded that you have been guilty of serious misconduct, including acts of insubordination to Track Foreman Dave Mason. You have been repeatedly warned and cautioned in the past to follow the contractual grievance procedure in handling your own complaints or those of other employees, and that if you want to question Management's orders, you should nevertheless obey them and grieve about them later at a time and in a manner that will not disrupt the orderly operations of the plant. You disobeyed these warnings in addition to your disobedience and disrespectful conduct toward Mr. Mason. Based on these matters and a careful review of your entire disciplinary and work record, we

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[7] "We also agree that the judgment is to be affirmed as to the § 1981 claims of racially-based discharge made by plaintiffs Pinkard and Lofton." (App. 54a).

have decided to discharge you effective immediately upon your receipt of this notice."

Mr. Hudson's testimony was direct evidence of the reason or motivation for Pinkard's discharge. *If it is credited*, then Pinkard was lawfully fired. The only evidence tending to discredit or refute this direct testimony, was the circumstantial evidence respondent claimed to fit the formula set out in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[8] But it is sheer nonsense to say there is no significant conflict in the evidence, for the ultimate issue of actual motivation (or pretext) turns entirely on whether Hudson's testimony is credible or whether its credibility has been overcome by inferences from Pinkard's circumstantial evidence. Credibility is everything in such a case. Nor is there any truth in the assertion that the evidence was "largely uncontradicted." Three pages earlier the majority opinion itself says, "At this point the testimony becomes even more conflicting." (App. 81a) The truth is this was a factual case tried vigorously for four days and many facts were controverted. Hudson's testimony alone covers 240 pages. The District Judge accepted his testimony as true and was clearly unfavorably impressed by Pinkard's demeanor. Credibility determinations are all-important in such a case and to say they are not an issue is as much as to say, "Don't bother me with facts, my mind is made up." For say what they may, the majority necessarily made a tacit credibility judgment in rejecting Hudson's testimony as false.[9]

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[8] Among other deficiencies in circumstantial proof according to this formula, was the absence of any proof that Pinkard was replaced by either a non-militant or a non-minority employee.

[9] Ignoring completely the direct evidence, as the court below did in this case, is in marked contrast to the treatment of direct evidence in *Lee* v. *Russell County Board of Education*, ___ F.2d ___, 29 FEP Cases 1508 (11th Cir., September 1, 1982), where direct evidence was characterized as "apparently highly probative" which could not be disbelieved by the trier of fact without "some indication of the court's reasons for rejecting [sic] this evidence." It is true that the

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW ERRED BY DISREGARDING THE "CLEARLY ERRONEOUS" STANDARD RULE OF 52(a), AND EXCEEDING ITS APPELLATE AUTHORITY, THEREBY ENGAGING IN "PRECISELY THE HISTORICAL PRACTICE OF THE FORMER FIFTH CIRCUIT CONDEMNED BY THE SUPREME COURT IN *PULLMAN-STANDARD v. SWINT*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)."—

It is the height of irony that the promise of *Swint* is so quickly broken, in a case involving not only the same or successor Court of Appeals, employer, and plant, but also involving a member of the plaintiff class in *Swint*, Mr. Louis Pinkard. *Swint* is both *stare decisis* and *res judicata* in this case.

The attempt by the majority below to distinguish *Swint*[10] seeks to confine its application narrowly to situations where the trial court did not make a finding on a material fact or where a legal error vitiated a finding. Outside those confines the majority considered itself free to carry on its historical practice of independent fact finding when it did not like the end result.[11]

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direct evidence there referred to was favorable to the plaintiffs, but also true that the court below, acting as trier of fact, gave no reason for discrediting Hudson's direct evidence, but gave a false explanation that "there is no significant conflict in the evidence." Direct testimonial evidence as to motivation cannot be "apparently highly probative" in one case and insignificant in another. Appellate fact-finding based on such inconsistent and irrational explanations is arbitrary.

[10] See p. 8, supra (App. 87a).

[11] The prevailing philosophy of the 5th and 11th Circuits in this regard are described at length in an article by Honorable John Godbold, Former Chief Judge of the old 5th and presently Chief Judge of the 11th Circuit. This article was published after the *Swint* case was decided, entitled "Fact Finding by Appellate Courts—An

Petitioner submits that this is a gross distortion of *Swint* and that both the majority's premises, major and minor, are entirely untenable. The question is of fundamental importance in the proper administration of justice in this Circuit and certiorari is justified in this case for quite the same reasons it was granted in *Swint;* indeed, there is more need now than ever, because the court below is now manifestly recalcitrant and shows itself still unwilling to relinquish its "historical practice" of independent fact finding.

The major premise: That the *Swint* holding is limited to the two narrow situations set out in the quotation, p. 8 *supra*, and

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Available and Appropriate Power", 12 Cumberland Law Review 365, 378, 379-380 (June, 1982):

> "As the exceptions proliferated the courts moved toward the position that the circumstances in which they could make findings of fact on appeal were not limited to a few fixed situations but were governed by a general principle: "*findings of fact may be made if 'a complete understanding of the issues may be had without the aid of separate findings' by the district court*, that is, *if the factual issues "may be fairly resolved" from the record presented.' Appellate fact finding is now a matter of general discretion and no longer a question of whether narrow exceptions are available to cover the individual case.*
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> * * *
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> ". . . Appellate fact finding will not improperly displace the district court's findings when the district court inadvertently overlooks a necessary factual matter, or when a necessary factual matter is purposefully not addressed because the district court rules on one ground *but the appellate court chooses to take a different view of the case.* Nor is the appellate court limited to supplying a 'missing' fact that is absent in the first instance; *the court of appeals may itself create the factual vacancy by holding that the trial court was plainly wrong in what it found or that the finding was made with an improper legal standard in mind.*" [Emphasis added.]

In other words, it finds the facts whenever it thinks it is fair to do so. The instant case preserved the historical practice whenever the narrowest possible construction of *Swint* can be said to be distinguishable.

that in all others the Court of Appeals may continue to find facts independently. This Court had just such a case before it in *White-Wilson Medical Clinic* v. *Robbins*, ___ U.S. ___, 102 S.Ct. 2229, 72 L.Ed.2d 842 (1982). In that case the trial court had considered and ruled on *all* the factual disputes and did not express *any* erroneous view of the law: the same Circuit, however, rejected the District Court's ultimate finding in favor of the employer as clearly erroneous purely as a matter of fact and then independently found as a fact that the employer was guilty of racial discrimination. On petition for certiorari, the Supreme Court three weeks after it had decided *Swint*, granted the writ, vacated the judgment and remanded the case to the Court of Appeals "for further consideration in light of *Pullman-Standard* v. *Swint*, 456 U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)." If *Swint* has no application in such a case, why did this Court order an exercise in futility such as that? Furthermore this Court in *Swint* was construing Rule 52(a) which has application to all civil cases tried without a jury. There is no reasonable basis in that decision for according to it a grudging application as the court below did in this case. The dissenting Judge, Lynne, was clearly correct that *Swint* applies in this case.

Minor premise: But even if that major premise were correct, in its opinion below the panel majority did nevertheless "resolve in the first instance a factual dispute which had not been considered by the District Court." The trial court found that Pinkard had failed in the first stage in his burden of proof; that he had not shown any disparity in treatment. It never reached the question whether Pullman even though having mixed motives would have fired him for his several acts of insubordination absent his militant advocacy of minority and union rights. As Judge Lynne's dissent pointed out (App. 88a), "such a finding was not made." Even by its own narrow construction of *Swint*, it would have to remand for the trial court to decide that factual issue. Furthermore, insofar as an "erroneous view of the law" can be said to have entered into the trial court's *Swint* decision, *i.e.*, its alleged failure to weigh the

Machinists Union's alleged racism in determining the bona fides of the Steelworkers' seniority system, so likewise the majority below found the same kind of alleged "erroneous view of the law" entering into the trial court's decision here, *i.e.*, failing to weigh Pinkard's advocacy of minority and union rights as a relevant mitigating factor counterbalanced against his misconduct, in determining the appropriateness of discharge as discipline for his misconduct. Even by its own narrow construction of *Swint*, then, the court below should not have assumed the role of independent fact-finder but should have remanded to the District Court for further factual findings.

Any way you look at the decision below, it conflicts irreconcilably with the *Swint* decision. Additionally, there is a demonstrated need for clarification of the "clearly erroneous" standard where there is evidence to support the District Court's findings. "Firmly convinced that a mistake has been made" is too easily equated to "disagree with the outcome" by appellate courts with the philosophy described in footnote 11, destroying important checks and balances in the judicial system.

II

THE COURT OF APPEALS ENGAGED IN REVERSE DISCRIMINATION BY WEIGHING RESPONDENT'S MILITANCE AGAINST HIS MISCONDUCT, AS A MITIGATING FACTOR IN DETERMINING THAT DISCHARGE WAS TOO SEVERE; IT THEREBY PLACED HIM IN A BETTER POSITION THAN A NON-MILITANT WHO COMMITTED THE SAME MISCONDUCT WOULD HAVE OCCUPIED.—

The Court of Appeals used this language, "the trial court improperly focused on plaintiff's antagonism without counterbalancing the defendant's own antagonism." (App. 85a). Finding that the respondent was guilty of some misconduct meriting some punishment, it said the question of lawfulness of the discharge was one of degree involving balancing Pinkard's

"antagonism" against Pullman's "antagonism." However, Pinkard's misconduct certainly must enter into the equation of assessing condign punishment; and just as surely employer "antagonism" attributable purely to misconduct is not at all reprehensible or unlawful. The only intelligible meaning that can possibly be ascribed to the majority's language is that Pinkard's misconduct has to be weighed against his protected conduct. This analysis is fully confirmed by the following finding of fact that Pinkard's discharge was "an overly severe penalty tainted to an impermissible degree by Pinkard's lawful advocacy of minority and union [sic] rights." (App. 86a) For this shows that the court below was actually weighing lawful advocacy against misconduct in deciding appropriateness of the penalty.

If it were simply a matter of weighing employee "antagonism" against employer "antagonism", this means that the more an employer dislikes the employee for whatever reason, the harder it is to fire him. Of course, this is not equality of employment opportunity, but patent inequality and completely arbitrary.

If it is a matter of weighing protected conduct against misconduct, this means that the more militant an employee is, the more misconduct it takes to fire him. Again, this results in patent inequality of employment opportunity, in which the activist is the beneficiary of reverse discrimination. This is precisely contrary to *Mount Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), dealing with the proof of causation in "mixed motive" cases.[12] The Court pointed out that

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[12] Among the circuits whose decisions are in conflict with the instant case on this point is the First Circuit. *N.L.R.B.* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, at 673-674 (1st Cir., 1979):

> "The Board has every right to criticize an employer for truly disparate treatment and draw adverse inferences therefrom, but a matter such as absenteeism involving many elements, such as length of service, frequency, the pattern, if any, the likelihood

there is reverse discrimination present whenever a requirement of proof of a higher degree of misconduct is imposed, to fire a person who has engaged in some protected conduct, than is required to fire someone who has not:

> "A rule of causation which focuses solely on whether protected conduct played a part . . . in a decision not to rehire, would place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."

Note that Holston, Sealie, and Pinkard were *all* discharged for insubordination. The former two were not shown to be activists, and for that reason alone they came out less favorably than Pinkard. Also Pinkard himself was found not to have been discriminated against on account of his *race*. Therefore, the penalty of discharge was not excessive for Pinkard qua Negro, but was excessive for Pinkard qua militant. Certainly this is not equal treatment, but discrimination in favor of militants.

In *Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 577-78 (1978), the Court referred to the employer's burden—

> ". . . of proving that he based his employment decision on a legitimate consideration, and not on an illegitimate one such as race . . . [H]e need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII . . . does not impose a duty to

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of a valid excuse, and the failure to call in, is a subjective mix. Within reasonable limits the employer must be permitted to run its business without the fear of second guessing by the Board. To hold otherwise would cause an apprehensive employer to give union activists the benefit of special treatment, an unfairness we commented upon as long ago as NLRB v. Billen Shoe Co., 1 Cir., 1968, 397 F.2d 801, 803. As the Court noted in Mt. Healthy, ante, at 286-87, the exercise of rights must not spill over to effect an advantage elsewhere. See Liberty Mut. Ins. Co. v. NLRB [592 F.2d 595] at 602 [1st Cir., 1979]."

> adopt a hiring procedure that maximizes hiring of minority employees . . . ." [Emphasis in the original.]

Section 1981 similarly does not impose a duty to adopt disparate disciplinary standards that maximize employment tenure of racial militants. While the evidence showed that discharge was the standard penalty for insubordination at Pullman, and the arbitrator sustained Pinkard's discharge on that basis, the majority below say some discipline of Pinkard was justified, but give no indication of how much. The majority requires some sort of undefined subjective gradation so that the more militant an employee is, the more misconduct he can engage in without being fired. Judge Lynne's dissent aptly scorns this theory of disciplinary calculus: "as though insubordination may easily be quantified." (App. 88a) Pinkard's discharge had been determined not to be too severe a penalty, through arbitration, the method provided for in the union contract for resolving that type of question. Having been sustained by the arbitrator and Judge Guin, both of whom saw and heard the witnesses testify, and approved in Judge Lynne's dissent, it is certainly far from an objective judgment by the two-judge majority that the discharge was too severe. Reasonable men could be of the opposite opinion; indeed, the arbitrator and two judges were. The Court of Appeals' subjective judgment imposes reverse discrimination in favor of militants, not equality of treatment.

> ". . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. *If both are not accorded the same protection, then it is not equal.*

> ". . . [W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations." (Emphasis added.) *University of California Regents* v. *Bakke*, 438 U.S. 265, 289-90 (1978).

The program imposed by the court below to require preferential treatment of Pinkard and other militants does not fall within the permissible area defined by *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), for voluntary affirmative action

plans, rather it constitutes a form of reverse discrimination contrary to the *Mount Healthy*, *Furnco*, and *Bakke* cases.[13]

The Court should grant the writ of certiorari because the decision below conflicts with applicable decisions of this Court, because of the conflict on this point among the circuits, and because the question presented is of great importance to employers and employees in the attainment of equal employment opportunity and in the maintenance of labor peace.

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[13] Where a militant has given an employer as much reason to fire him as would suffice to fire some non-militant employee, the militance demands no reduced disciplinary sanction. *Emporium Capwell Co.* v. *Community Organization*, 450 U.S. 50, 71 (1975). Militance cannot be weighed against misconduct in determining the appropriateness of the disciplinary sanction, then if the discipline is found too severe as a result of such balancing, have the inference of excessive severity used as evidence of pretext. Under *Mount Healthy*, *supra*, the question whether Pinkard would have been fired for the misconduct, must be decided by prescinding it from, not by balancing it against the protected conduct. Otherwise, the reasoning is circular: He is a militant, therefore, the penalty should be less than it would be for others; the penalty is not less, therefore he was fired for militance. The trier of fact must consider under *Mount Healthy* whether Pullman would have fired Pinkard for the totality of his misconduct (as it fired Holston and Sealie for their insubordination) considered *alone*, and *not* counterbalanced, *i.e.*, not according any preferential treatment to Pinkard because of his activism. The majority below placed Pinkard in a "better position as a result of the exercise of . . . protected conduct than he would have occupied" had he not engaged in protected conduct, just as *Mount Healthy* says should not be done.

III

SECTION 1981 DOES NOT CONFER JURISDICTION OVER CLAIMS OF EMPLOYMENT DISCRIMINATION OR TO PREFERENTIAL TREATMENT, ON ACCOUNT OF LAWFUL ADVOCACY OF MINORITY AND UNION RIGHTS.—

The court below said the Civil Rights Act of 1866, 42 U.S.C.A. § 1981, prohibits discharge on account of lawful advocacy of minority and union rights. Its only reasoning to support this was that:

> "In this circuit, it is well settled that 'Section 1981 is a parallel remedy [sic] against discrimination which may derive its legal principles from Title VII.' " (App. 75a)

Evidently this means they are substantively equivalent or coextensive. However, although this view was quite widely entertained up until this Court's decision in *General Contractors Ass'n* v. *Pennsylvania*, ___ U.S. ___, 102 S.Ct. 3141, 73 L.Ed.2d 835 (June 29, 1982), that decision held to the contrary, that they are not equivalent substantively. It held that actual, subjective racial motivation must be shown under § 1981 even in "disparate impact" cases in which, under Title VII, such motivation need not be shown. Section 1981 also says nothing about retaliation or advocacy. Nor does it refer in any way to union rights.[14] It simply reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, given evidence, and to the full and equal benefit of all laws and

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[14] Though referred to by the court below as part of the reason it claims Pinkard was fired, discharge for union advocacy would seem to be within the exclusive jurisdiction of the National Labor Relations Board, and in any event not within § 1981. The court below improperly treats § 1981 as an omnibus charter to fashion a body of law to remedy all real or imagined injustices in the work place, and to review arbitration awards de novo, which is certainly without basis in the statutory language or history.

> proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, pains, taxes, licenses and exactions of every kind, and no other."

Clearly this creates no right to *preferential* treatment for anyone. In *General Contractors Ass'n*, supra, the Court reviewed the legislative history of § 1981 at length, concluding:

> "The supporters of the bill repeatedly emphasized that the legislation was designed to eradicate blatant deprivations of civil rights clearly fashioned with the purpose of oppressing the former slaves. To infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern."

Justice Stevens, concurring in part, said:

> "I do not believe Congress intended § 1981 to have any application at all in the area of employment discrimination generally covered by Title VII of the Civil Rights Act of 1964 . . . ." 102 S.Ct. at ____, 73 L.Ed.2d at 835.

In *Georgia* v. *Rachel*, 364 U.S. 780, 790 (1966) it was said:

> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase 'as is enjoyed by white citizens.' That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected."

And in relation to a claim that an employee was fired in retaliation for his lawful advocacy of equal employment opportunity for women, in *Great American S. & L. Ass'n* v. *Novotny*, 442 U.S. 366, 376-77 (1979), the Court said:

> "The right Novotny claims under § 704(a) did not even arguably exist before the passage of Title VII."

Section 704(a), 42 USCA § 2000e-3(a) reads in relevant part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful

> employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Because of the substantial limitations of the scope of § 1981 represented by *General Contractors Assn* v. *Pennsylvania*, *supra*, it seems the court below may have assumed too uncritically that jurisdiction existed under that statute to adjudicate claims of retaliation for advocacy of minority and union rights.

Furthermore, the requirement of proof of actual, subjective purpose or motivation under § 1981 appears to us to be absent here.[15] What we have here is two judges who declare that Pullman should have given Pinkard preferential treatment on

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[15] *Gay* v. *Waiters Union, Local 30*, ___ F.2d ___, 29 FEP Cases 1027 (9th Cir., 1982) held that the actual motivation which must be shown under § 1981 is not shown by inference from quantitative proof, or proof of differences in degree, unless there is "a clear pattern, unexplainable on grounds other than race [;and] absent a 'stark' pattern, 'impact alone is not determinative . . . .'"; citing in support *Swint*, ___ U.S. ___, 102 S.Ct. 1781 at 1790."

> "Discriminatory intent . . . means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive."

This holding is contrary to the lower court's decision herein which inferred or presumed a retaliatory motive from its own quantitative judgment that the degree of discipline was excessive because it should have been mitigated for activists, without a bit of proof of any clear pattern; the only instance wherein even the majority found discrimination was Pinkard's. Further authority that intentional discrimination cannot be inferred from a court's subjective value-judgment is found in *County of Washington* v. *Gunther*, 452 U.S. 161, 181 (1981); *Gerlach* v. *Michigan Bell Telephone Co.*, 501 F. Supp. 1300, 1321 (E.D.Mich., 1980); and *Power* v. *Barry County*, 539 F. Supp. 721, 723-24 (W.D. Mich., 1982).

account of his burdensome extra-contractual grievance handling. Several other circuits have rejected the idea of preferential treatment in such cases. *Hochstadt* v. *Worcester Foundation*, 545 F.2d 222 (1st Cir., 1976); *Hernandez* v. *Alexander*, 607 F.2d 920 (10th Cir., 1979). In sustaining a transfer and a discharge for unreasonable complaint making activity, against the charge of retaliation, both these Circuits recognized a necessity of balancing the employee's rights to protest against the employer's interest in operating without unreasonable disruption. This concept of balancing is just the opposite of the Eleventh Circuit's, for it limits the extent of privileged militance, it does not give the militant special privileges. Certainly those Circuits' concept of balancing did not give Hernandez and Hochstadt any privilege of *looser* disciplinary standards, rather it placed reasonable limits on the manner and extent of their protest activities, a concept rejected by the Eleventh Circuit, which says if you allowed Pinkard a little flexibility, you lost forever your right to set any limits to his non-contractual grievance handling, even by union contract. That Pullman did not think Pinkard was entitled to preferential disciplinary treatment but to be treated the same as other insubordinate employees is a far cry from the *purposeful* discrimination prohibited by § 1981.[16]

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[16] Furthermore, since *General Contractors Ass'n* v. *Pennsylvania*, *supra*, has put to rest the idea that § 1981 is substantively coextensive with Title VII, it may be pointed out that the former says all persons will have the same right to enforce contracts as white citizens, and no other. This immediately calls into question whether the holding in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 987 (1971), that an arbitration award adverse to the plaintiff is not conclusive in a Title VII case, has equal application to a § 1981 case. A white citizen whose discharge has been sustained in arbitration, is bound by the award in a subsequent action on the contract, unless he proves his union breached its duty of fairly representing him. Should not a black or a militant have to prove a breach of fair representation too? Otherwise, he is accorded preferential treatment over the white

We believe there is a conflict between the decision of the court below on this point and the decisions of this Court and of other circuits and that the writ of certiorari should be granted.

CONCLUSION

The historical practice of the former Fifth (now Eleventh) Circuit, still persisted in after *Swint*, reflects upon the integrity of the judicial system at all levels: on the District Court, for the futility of its efforts at fact finding; on the Court of Appeals itself, for its undue assumption of judicial omnipotence; and on the Supreme Court, for the facile and unrestrained disregard of its decisions. To allow this historical practice to continue is at war with the institutional framework of

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citizen, which § 1981 does not require. At the trial Pinkard's lawyer stated (Tr. 322-323):

> "MR. CLEMON: Your Honor, *we will stipulate that the [arbitration] case was fairly tried. That Mr. Pinkard was fairly represented.*"

If Mr. Pinkard is to have an equal right to enforce contracts to that of a white citizen, no breach of § 1981 could occur in view of the result of the arbitration, adverse to Mr. Pinkard, it having been stipulated that there was no breach of the duty of fair representation, which fact would preclude a white citizen from recovering for breach of contract under LMRA § 301, 29 U.S.C.A. § 185; equality of right to enforce contracts requires that Pinkard also be precluded from recovery under § 1981. See also *Davis* v. *U.S. Steel Supply*, ___ F.2d ___, 29 FEP Cases 1202 (3rd Cir., 1982), holding that an adverse state court judgment is conclusive on the plaintiff in a § 1981 action; and *Becton* v. *Consolidated Freightways*, ___ F.2d ___, 29 FEP Cases 1078 (6th Cir., 1982), a suit under § 1981 claiming discharge on account of race and retaliation; it was held that the arbitration award sustaining the discharge was sufficient articulation of a reason and of the degree of punishment, so that wrongful motivation had to be proved by plaintiff without weighing activism in determining sufficiency of evidence of misconduct to justify the degree of discipline.

checks and balances necessary to the existence of a liberal democratic society. The Court should therefore issue a writ of certiorari, reverse the judgment of the Court of Appeals, and remand with directions to enter judgment affirming the judgment of the District Court.

Respectfully submitted,

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